STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH DELBERT FREEMAN,

Defendant-Appellant.

UNPUBLISHED
January 28, 2003

No. 235190
Calhoun Circuit Court
LC No. 00-004376-FH

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced to 84 to 360 months' imprisonment as a fourth habitual offender, MCL 769.12. Defendant appeals as of right from his conviction. We affirm.

The complainant, Randy Behm, testified that defendant approached him at a gas station and asked for a ride. Behm complied and defendant directed him to an unfamiliar residential neighborhood. Defendant told Behm that he wished to pay him $10 for his trouble but only had a $50 bill inside his house. Behm gave defendant $40 in change. Defendant left the car and returned a few minutes later. When defendant reentered the vehicle, he knocked down the rearview mirror and told Behm not to look at him. Defendant then reached for what he said was a gun. Defendant directed Behm to drive. Soon after, defendant instructed Behm to pull over and demanded money from him. Behm dropped his wallet in the car, grabbed his keys, and ran. Behm looked back and saw defendant reach for the wallet. Thereafter, defendant ran from the car. Behm went back to his car and started following defendant again. Behm testified that he wanted to get "another good look" at him. When defendant made a motion like he was reaching for a weapon, Behm drove away and called the police. Behm never actually saw a weapon. He gave a description of the perpetrator to the police. Later that day, Behm selected defendant's photograph at a photographic showup. During a subsequent physical lineup, Behm again selected defendant.

The first issue on appeal is whether defendant was denied his due process rights with regard to the photographic showup when he was in custody and could have participated in a lineup with counsel present. We hold that defendant's rights were not violated.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous, which exists when the reviewing court is left with a definite and firm

conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J., concurring in part and dissenting in part); 505 NW2d 528 (1993). Defendant concedes that he failed to preserve this issue below. Thus, the unduly suggestive pretrial identification procedure claim may be reviewed on appeal only for manifest injustice. *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985).

Ordinarily, identification by physical lineup is required when an accused is in custody or can be compelled to appear, unless a legitimate reason for holding a photographic showup exists. *Kurylczyk*, *supra* at 298, n 8, 318; *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995).[1] If the suspect is in custody, the suspect has the right to the presence of counsel at a showup. *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001).

Defendant's argument that he was in custody because he was on parole and technically still under the control of the Department of Corrections (DOC) is without merit. See MCL 791.238. That is not the type of custody to which the rule applies. See *People v Eggleston*, 148 Mich App 494, 500; 384 NW2d 811 (1986), citing *People v Blackburn*, 135 Mich App 509, 518; 354 NW2d 807 (1984) (defining "custody" as "whether the defendant could reasonably believe that he was not free to leave"). The rule does not apply to the precustody period. *People v McFadden*, 159 Mich App 796, 798-799; 407 NW2d 78 (1987). Our Supreme Court has "never applied the focus [of an investigation] test to a precustodial photographic lineup[[2]] except in a nonbinding opinion signed by two justices." *People v McKenzie*, 205 Mich App 466, 470; 517 NW2d 791 (1994) (right to counsel), citing *Kurylczyk*, *supra* at 298-300. Further, there is no evidence that defendant could have been compelled to appear for a lineup. See *Kurylczyk*, *supra*; see also *Strand*, *supra* at 104 (compulsion to appear includes situations where the defendant is under arrest). Therefore, the police were not required to retrieve defendant or obtain counsel for him at the photographic showup.[3] See *McCray*, *supra*.

Moreover, the photographic identification procedure employed in the present case was not so suggestive as to deprive the defendant of due process. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 306, 318. The following factors should be considered: the witness' opportunity to view the perpetrator when the crime occurred; the witness' degree of attention; whether the witness' previous description of the perpetrator was accurate; the witness' level of certainty at the identification; and the lapse of time between the incident and the identification. *Id*.

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[1] Whether the defendant is "readily available" for a lineup also has been a factor in this determination. However, that test has been likened to the compulsion to appear test. *People v McFadden*, 159 Mich App 796, 799; 407 NW2d 78 (1987).

[2] This Court in *People v McKenzie*, 205 Mich App 466, 470; 517 NW2d 791 (1994), citing *Kurylczyk*, *supra* at 298-300, used the phrase "photographic lineup," meaning "photographic showup."

[3] We note that defendant was represented by counsel at the physical lineup. See *People v Winters*, 225 Mich App 718, 722; 571 NW2d 764 (1997).

All these factors weigh in favor of plaintiff. Behm, the complainant, had ample time during the incident to view defendant and commit his features to memory. *Id*. Behm described defendant once and identified him in the photograph the day of the incident with certainty. Three months later, Behm identified defendant in the physical lineup with certainty. *Id*. Thus, it is likely Behm's identification was correct and there was no risk of misidentification or suggestion. *Id*.; *Gray*, *supra*.

The second issue on appeal is whether trial counsel's failure to object to the photographic showup described above amounts to ineffective assistance of counsel. For the reasons stated above, we hold that defendant's trial counsel was not ineffective.

The defendant must make a testimonial record in the trial court in connection with a motion for an evidentiary hearing or review is limited to mistakes apparent on the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because the pretrial identification procedure in this case was proper, defendant cannot show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant has not overcome the strong presumption of effective counsel. *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Indeed, if the defense had objected to the pretrial identification procedure, the objection likely would have been overruled and counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Deciding not to make a frivolous objection also qualifies as a matter of trial strategy that we will not second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Counsel's failures can constitute ineffective assistance only when they deprive the defendant of an outcome-determinative substantial defense, which did not occur in this case. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902; 554 NW2d 899 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey